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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS,
Petitioner,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 8, 1985

QUESTION PRESENTED

Whether Section 18(a)(1)(B) of the Federal Trade Commission Act authorizes the FTC to promulgate a rule prohibiting an act or practice as "unfair" within the meaning of Section 5(a)(1), when the commercial activity is permitted by the states under close regulation designed to protect against the very consumer injuries at which the FTC's rule is aimed.[1]

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[1] In its petition for certiorari seeking review of the same judgment of the Court of Appeals, the American Financial Services Association presents this and two other questions raised by the decision below. Petitioner South Carolina Department of Consumer Affairs, while especially alarmed by the FTC's gratuitous exercise of preemptive power in this case, reserves the right to address those two other questions if certiorari is granted, and adopts, by reference as though fully set forth herein, those portions of AFSA's petition that address those questions. The parties below are listed in AFSA's petition at page ii.

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Petitioner South Carolina Department of Consumer Affairs ("SCDCA") seeks review of a decision of the D.C. Circuit upholding a Federal Trade Commission rule broadly preempting state regulation of consumer credit practices.

OPINION BELOW

The opinion of the Court of Appeals, reported at 767 F.2d 957, is set forth as Appendix A to the petition of American Financial Services Association, which has filed a petition seeking review of the same judgment. The FTC's Credit Practices Rule, codified at 16 C.F.R. Part 444, is set forth as Appendix B to AFSA's petition. The FTC's statement of the rule's basis and pur-

pose, published at 49 Fed. Reg. 7740 (1984), is set forth as Appendix C to AFSA's petition. Citations herein to "Pet. App." are to the separately bound appendix to AFSA's petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1985. On October 2, 1985, Chief Justice Burger extended the time in which to petition for certiorari from October 10, 1985 to November 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

FEDERAL TRADE COMMISSION ACT—

§ 5(a)(1), 15 U.S.C. § 45(a)(1):

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

§ 18(a)(1)(B), 15 U.S.C. § 57a(a)(1)(B):

> "(1) . . . the Commission may prescribe—
>
> . . .
>
> (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title) . . . . Rules under this paragraph may include requirements prescribed for the purpose of preventing such acts or practices.

STATEMENT OF THE CASE

The South Carolina Department of Consumer Affairs adopts the statement of the case set forth in AFSA's petition, as though fully set forth herein.

REASONS FOR GRANTING THE WRIT

In upholding the Credit Practices Rule, the Court of Appeals rejected—virtually without analysis—SCDCA's claim that the FTC had exceeded its authority under Section 18(a)(1)(B) of the Federal Trade Commission Act by preempting carefully wrought consumer protection statutes of states which, like South Carolina, permit consumers to obtain credit by pledging household goods as collateral but regulate consumer credit transactions so as to protect consumers against the injuries with which the FTC professes to be concerned. Pet. App. 61a-65a. The court's majority did so in spite of its own recognition that Congress did *not* intend to authorize the FTC freely to preempt state consumer-protection laws. Pet. App. 61a-62a n.41. And it did so in the teeth of Judge Tamm's admonition in dissent that principles of federalism dictate deference by the FTC to the states' exercise of their police powers—and that, in measuring the general regulatory burden of rules proposed under Section 18(a)(1)(B), the FTC should consider "the disruptive effect federal regulation would have upon state regulatory schemes." Pet. App. 69a-70a n.2.

In framing the Credit Practices Rule, the FTC was clearly conscious that it was treading on thin ice in supplanting state consumer-protection laws. Although it prohibited consumers from obtaining credit by pledging household goods and other property as collateral, it lamely insisted that it was not preempting any state law—because creditors could "comply" both with the rule *forbidding* the taking of security interests in such property *and* with state laws *allowing* them to do so. See Pet. App. 256a-257a. This is little more than a play on words. The FTC further belied its confidence in the legitimacy of its exercise of preemptive power here by promising to consider any state's request for an exemp-

tion from the Credit Practices Rule if the state can demonstrate that it offers protections equal to or greater than those provided by the rule—provided that it administers and enforces those protections "effectively." 16 C.F.R. § 444.5 (Pet. App. 86a).

Review should be granted to make clear that the FTC may not, pursuant to its Section 18(a)(1)(B) rulemaking authority, thus make supplicants of the states, requiring them to prove to the satisfaction of federal authorities that they have "effectively" exercised their police powers so as to afford their own citizens protection against injuries with which the FTC is concerned.[1] This is not the regime that Congress contemplated in enacting Magnuson-Moss in 1975. As the Court of Appeals recognized, Congress did not intend in expanding the FTC's powers "to occupy the field or in any way to preempt State or local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the Commission." H.R. Rep. No. 1107, 93d Cong., 2d Sess. 45 (1975) (quoted at Pet. App. 61a-62a n.41). The FTC was intended to exercise preemptive authority only where state regulation was demonstrably ineffective. It may not justify preemption by blunderbuss claims that preemption is warranted because state law "does not *always* offer adequate protection." Pet. App 153a (emphasis added). The burden should not be on the states to prove, after the FTC has exercised its preemptive power, that they are affording their own citizens adequate protection.

This is not a situation in which federal intervention is required because the activity in question is beyond

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[1] Among other things, states must satisfy the FTC with respect to "the resources committed by the state" to enforce its laws (Pet. App. 258a), and the FTC reserves the right to revoke any exemption if it concludes that a state is not administering and enforcing its laws as vigorously as federal officials deem appropriate. (*Id.*)

the jurisdiction of the states to regulate; to the contrary, this is a situation in which the states have dealt comprehensively with the activity in question, and the activity is one of intimate local concern. The states have dealt with it by enacting comprehensive consumer-protection laws carefully balancing a complex set of interconnected interests. They widely regulate interest levels in light of other restrictions on the availability and cost of credit, for example; and they establish narrowly tailored restrictions on borrower conduct that avoid abuse without unduly curtailing consumer access to credit.

South Carolina itself permits consumers to pledge household goods to obtain loans but protects consumers against the very abuses identified by the FTC. It has outlawed false threats to repossess (S.C. Code Ann. § 37-5-108(2) & (5)(a)), and it allows a borrower not only to obtain an injunction against a lender who engages in such abusive debt collection practices, but also to obtain treble damages along with court costs and attorney's fees (*id.* § 37-5-108(2) & (6)). Abusive debt collection acts or practices are also subject to a wide range of administrative remedies by the Administrator of the South Carolina Department of Consumer Affairs, including injunctions (*id.* §§ 37-6-110 and 37-6-111), cease-and-desist orders (§ 37-6-108), and civil actions for damages either for an individual or a class (*id.* § 37-6-113(1)), as well as for civil penalties.

At a minimum, the FTC must not *needlessly* trench on state consumer-protection schemes by preempting state regulation more broadly than necessary to prevent the abuses identified on the rulemaking record. If the FTC is concerned about false threats of repossession of household goods, it should preempt state law to the extent that state law permits such false threats—rather than preempting all state laws permitting the use of household goods as collateral. If it is concerned about lenders ex-

erting unfair pressure on borrowers, it should preempt state law to the extent that state law permits lenders to exert such unfair pressure—and no further. What it may not do under Section 18(a)(1)(B) is to forbid, sweepingly and gratuitously, conduct permitted by state law that does not itself injure consumers. No such gross infringement of state police powers was authorized by Congress.

Here, as in the case of another consumer-protection rule promulgated under Section 18(a)(1)(B), the FTC's preemption of state law "is almost as thorough as human ingenuity could make it." *American Optometric Association* v. *FTC*, 626 F.2d 896, 910 (D.C. Cir. 1980). Accordingly, here as there, "the Commission has at least approached the outer boundaries of its authority and may have infringed on that deference to the states' exercise of their police powers dictated by the principles of federalism." *Id.* Whether the FTC has crossed the line here—exceeding its preemptive authority under the Magnuson-Moss Act—is a question that warrants this Court's review.

CONCLUSION

For the foregoing reasons, review should be granted.

Respectfully submitted,

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